INDEX

	Page
Opinions below	1
Jurisdiction	1
Statute involved	2
Question presented	2
Statement	2
Argument	5
Conclusion	9

CITATIONS

Cases:	
Alabama Power Co. v. *Ickes*, 302 U.S. 464	8
Atlanta Terra Cotta Co. v. *Georgia Ry. & Electric Co.*, 132 Ga. 537, 64 S.E. 563	8
Clearfield Trust Co. v. *United States*, 318 U.S. 363	8
Just v. *Chambers*, 312 U.S. 383	8
Montana Ry. Co. v. *Warren*, 137 U.S. 348	8
Olson v. *United States*, 292 U.S. 246	8
Tyson Creek R. Co. v. *Empire Mill Co.*, 31 Ida. 580, 174 Pac. 1004	6
United States v. *Allegheny County*, 322 U.S. 174	8
United States v. *Miller*, 317 U.S. 369	8
Statute:	
Act of June 19, 1948, c. 589, 62 Stat. 566	2
Miscellaneous:	
Annotation, 156 A.L.R. 1416	8

In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 434

GEORGIA KAOLIN COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The district court's findings of fact and conclusions of law are appended to the petition (pp. 1a-24a). The opinion of the court of appeals (Pet. 25a-28a) is reported at 214 F. 2d 284.[1]

JURISDICTION

The judgment of the court of appeals was entered on June 23, 1954. A petition for rehearing

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[1] Emphasis found in the district court's findings and conclusions and in the opinion of the court of appeals, as printed in the appendix to the petition, was supplied by petitioner.

was denied on August 5, 1954. The petition for writ of certiorari was filed on November 3, 1954. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

STATUTE INVOLVED

The Act of June 19, 1948, c. 589, 62 Stat. 566, is printed in the appendix to the petition (pp. 29a-30a).

QUESTION PRESENTED

Between 1940 and 1947, the United States occupied lands belonging to petitioner under a lease which provided that it would be liable if its occupancy resulted in diminution of the property's value "as of the date of this lease" (1940). The principal question presented is whether in a suit under the lease agreement to recover for such diminution in value the district court properly refused to take into account evidence based on explorations undertaken years after the date of the lease (*i. e.*, between 1949 and 1951), which was designed to show that the mineral deposits in the land were far more extensive than they were known to be in 1940.

STATEMENT

Pursuant to an enabling act conferring jurisdiction upon the United States District Court for the Middle District of Georgia (Pet. 29a-30a), petitioner sued to recover from the United States damages resulting to its lands from their use for the training of soldiers during World War II.

The pertinent facts, as set forth in the findings

of the district court (Pet. 1a-24a), may be summarized as follows:

The lands involved in the dispute consist of 845 acres which had been purchased by petitioner in the belief that they contained kaolin clay (Pet. 1a-2a, 6a). One hundred and seventy-five acres had been purchased in 1929 as part of a larger transaction which involved a total purchase price of $40,000. The remaining 670 acres had been acquired in April 1940 for $25,000 ($37.31 per acre). This purchase took place at a public auction and was made by petitioner, after it had found kaolin in 10 of 35 test holes, because petitioner's president "thought it worth taking a gamble." (Pet. 1a-2a).

In October 1940, the lands were leased to the City of Macon, Georgia, on the understanding that the lease would be transferred to the United States and the property used as part of a military training base (Pet. 2a). The lease provided that at its termination the lessee would "restore the premises to the same condition as that existing at the time of the entering upon the same under this lease"; that "Any and all claims for damages to the leased premises * * * are determinable according to the value of said premises as of the date of this lease * * *"; and that, if the lease were transferred to the United States, it would be liable (Pet. 3a).

The lease was transferred as contemplated and the United States occupied the lands from October 1940 until it surrendered them in February 1947 (Pet. 3a). Petitioner's amended complaint based

on diminution in value resulting from occupancy alleged that when the lands were returned they were so impregnated with live shells and duds as to render them unusable for the mining of kaolin. It sought damages of $1,261,000, which was asserted to be the fair value of the lands when the lease was made (Pet. 5a).

At the trial, the parties agreed that the highest and best use to which the lands could have been put at the time the lease was made was the mining of kaolin (Pet. 13a). Upon a consideration of comparable sales of "kaolin lands" the district court fixed the 1940 value of petitioner's lands at $50 an acre (Pet. 20a). Since the Government conceded that 56.5 acres had been so impregnated with missiles as to make them worthless (Pet. 21a), the court assessed the damages to them at $2,825 (Pet. 24a). It found that the remaining 785.5 acres were "practically, or according to one of the experts, ninety-nine percent free of duds and explosives" (Pet. 21a), but that a popular feeling to the contrary had halved their market value (Pet. 22a). In consequence, it assessed the damages to them at $18,962.50, or $25.00 an acre, and directed judgment against the United States for $21,787.50 (Pet. 24a). The court apparently did not give weight to the evidence, derived from explorations conducted between 1949 and 1951, which purported to show the full extent and value of kaolin deposits in the lands (Pet. 7a-8a).

The court of appeals affirmed, holding that "There is ample and substantial evidence in this

record to support the district court's findings of fact" (Pet. 26a).

ARGUMENT

1. Petitioner concedes, as it must, that the ceiling on damages under the contract is the 1940 value of the property. The burden of its argument is that "value" meant "actual value" or "fair value" rather than "market value", and that the court should have given weight to expert testimony predicated on the 1949-1951 explorations "in fixing the value of the lands as of the lease date" (Pet. 4; see also Pet. 12, 5a).[2] On this basis, petitioner contends that land which it purchased in 1940 at approximately $37 an acre has a 1940 value, for purposes of computing damages, of approximately $1,492 an acre.

Construing the word "value" as it appears in the contract ("Any and all claims for damages * * * are determinable according to the value of said premises as of the date of this lease * * *"), both the district court and the court of appeals concluded that the proper construction is that the parties contemplated the then-existing *market value* and meant to eliminate from consideration changes or fluctuations which might occur after the date of execution of the lease. This construction of the contract is plainly a reasonable one and it

[2] In using the above terms, we do not imply that we regard petitioner's concept of "actual value" or "fair value" (in contrast to market value) as providing a generally meaningful or workable standard for the determination of land values.

presents no question of general importance warranting review by this Court. Petitioner's statement that there are ten other cases brought under the same enabling act pending in the Middle District of Georgia and that the lease here involved is like that made by owners of adjacent properties (see Pet. 3) scarcely serves to indicate that the potential significance of the court's interpretation of the lease is more than local.

The suggestion that the judgment below deprives petitioner of property without due process of law, in contravention of the Fifth Amendment to the Constitution, is frivolous. This case does not involve a taking of property but the construction of a contract freely entered. The construction adopted is not only a reasonable one on the facts, but allows a 1940 evaluation ($50 per acre) substantially in excess of what petitioner was paying for such land in 1940 ($37 per acre). That valuation, moreover, was well within the range of the testimony relating to 1940 market value (Pet. 20a).

Petitioner also seeks comfort from decisions in three States (Idaho, California and New York) in which it was held, in eminent domain proceedings, that it was proper to consider evidence of value which was not discovered until after the valuation date (see Pet. 11-12). Thus, in *Tyson Creek R. Co.* v. *Empire Mill Co.*, 31 Ida. 580, 174 Pac. 1004 (1918), the court allowed compensation for gold which was discovered on condemned property subsequent to the date the summons was issued.

It is to be noted that in each of the state court cases upon which petitioner relies the discovery of the additional evidence was made between the valuation date and the date when ownership passed to the condemnor. Thus, they may well be explained by an inclination on the part of the courts concerned to permit a measure of flexibility when a significant and wholly unanticipated change affecting valuation takes place between the date of notice to the condemnee and the date of actual change of ownership, *i. e.*, at a point when there still has been no alteration in the original position of the parties.

In the instant case, the claim of new evidence showing enhanced value was made approximately a decade after initial occupancy by the United States and several years after surrender of the premises. Moreover, it was not based upon wholly unforeseeable developments. Petitioner was in the business of mining kaolin; it knew that the properties which it had purchased contained some kaolin; and it had bought them because it thought they were worth a "gamble." It is against this factual background that one must view the parties' express agreement to rest on 1940 value in the event of damage to the leased property.

Moreover, if analogy is to be drawn to eminent domain cases in construing this particular contract, the test of just compensation under federal law, as frequently iterated by this Court, is market value

at the time of the taking.[3] See, *e. g.*, *Olson* v. *United States*, 292 U. S. 246, 255; *United States* v. *Miller*, 317 U. S. 369, 374. Market value as of a particular time obviously does not take into account factors which were not known or operative at that time.[4] The logic of the test approved by this Court necessarily precludes the use of hindsight evidence. Petitioner cites no case arising under federal law which takes a different view.

2. Petitioner also challenges the district court's determination that the value of 785.5 acres was partially rather than totally destroyed. This finding of fact, which is supported by the testimony of numerous witnesses (Pet. 21a), has been affirmed by the court of appeals (Pet. 26a). There is no occasion for departure from this Court's "well-established rule" that it will not ordinarily re-examine concurrent findings on such matters. *Just*

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[3] The petition recognizes (p. 9) that the contract involved is a public contract and governed by federal law. See *United States* v. *Allegheny County*, 322 U.S. 174, 183; *Clearfield Trust Co.* v. *United States*, 318 U.S. 363, 367. Moreover, it does not in any event appear that Georgia law on this point differs from federal law. See *Atlanta Terra Cotta Co.* v. *Georgia Ry. & Electric Co.*, 132 Ga. 537, 545-546; 64 S.E. 563, 566 (1909).

[4] Mining "prospects," even though uncertain, stand on a different footing, for they influence market value as is evident from the fact that they are "a constant subject of barter and sale," *Montana Ry. Co.* v. *Warren*, 137 U.S. 348, 352. See, also, Annotation, 156 A.L.R. 1416, 1417. Consistently with this view, the courts below considered the value of the lands as kaolin lands. They did so, however, from the vantage point of 1940, examining 1940 transactions in similar lands, and not by the attempted use of hindsight.

v. *Chambers*, 312 U. S. 383, 385; *Alabama Power Co.* v. *Ickes*, 302 U. S. 464, 477.

CONCLUSION

The decision below is correct and raises no issue of general importance. There is no conflict among the circuits. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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DECEMBER, 1954.

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